

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Windstream Telephone System
FCC Tariff Nos. 6 and 7

Transmittal No. 122

**REPLY TO PETITION OF VERIZON TO REJECT
OR SUSPEND AND INVESTIGATE WINDSTREAM'S TARIFFS**

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Windstream Telephone System filed revised switched access tariffs to remove a mixed-use pricing mechanism related to BDS facilities. Windstream still sells switched access facilities at switched access rates. The elimination of the mixed-use pricing simply means that a purchaser cannot put switched access circuits onto a high-capacity BDS facility, thereby reducing the detariffed price for the facility. Verizon objects to that, but its objections are meritless.

Verizon asserts first that Windstream's change circumvents the rate cap for switched access facilities. But under the revised tariff, all customers still purchase all of their switched access facilities at rate-capped rates. What customers can no longer do is purchase BDS facilities and pay for a subpart of those BDS facilities to be provisioned as switched access. Verizon is thus actually complaining about higher BDS rates—which it championed—but those are detariffed, so it cannot complain about that here. The removal of the mixed-use pricing mechanism does not contravene any switched access rate cap.

Second, Verizon asserts that Windstream's revised tariff is ambiguous because Verizon cannot tell how Windstream will charge for previously provisioned mixed-use facilities, or whether customers may purchase mixed-use facilities in the future. But there is no ambiguity: Windstream has eliminated the mixed-use pricing mechanism, so by the plain terms of the tariff customers will now need to provision services as either BDS or switched access. Customers who are doing otherwise now will simply transition existing mixed-use facilities to one or the other, per that same plain language.¹ All relevant pricing plans are month-to-month, so this will happen at the next month's billing cycle. None of that is ambiguous.

¹ Customers with an existing mixed-use pricing plan should review the capacity needed for each service and groom its network accordingly, as most carriers are doing today. Network grooming produces a more efficient network design with the added benefit of reduced costs to the carrier.

In its final argument, Verizon maintains that Windstream *must* make mixed-use billing available, and a failure to do so is unjust and unreasonable. But in support of this Verizon points solely to an order that barred traffic pumpers from forcing IXCs to route traffic to more distant physical locations.² That has no relevance here. Windstream’s change does not force Verizon to route its traffic to different locations or to pay any more for switched access. It simply requires that switched access be provisioned only on switched access facilities. That complies with the law. Windstream has filed a lawful tariff; the Commission should dismiss Verizon’s petition.

BACKGROUND

On November 3, 2023, Windstream filed revised tariffs No. 6 and 7 on fifteen days’ notice, per 47 U.S.C. § 204(a)(3).³ The revision removed a pricing option whereby a customer who had provisioned BDS service to a premises could reduce the rate paid for that service by “us[ing] a portion of the available capacity for Switched Access Service.”⁴ The prior tariff referred to that billing mechanism as “mixed use.” Windstream’s revised tariffs left in place all of the terms for the purchase and provisioning of switched access service; the relevant high-capacity BDS facility has been mandatorily detariffed since 2020.⁵

Windstream removed this pricing option in significant part because Verizon was using it to engage in a type of pricing arbitrage. Under the mixed-use provision of the prior tariff,

² *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, Memorandum Opinion and Order, 35 FCC Rcd. 6198, ¶ 24 (2020) (“*Northern Valley Order*”).

³ *Petition of Verizon to Reject or Suspend and Investigate Windstream’s Tariffs*, Windstream Telephone System FCC Tariffs Nos. 6 and 7, Transmittal No. 122, Ex. A. (“*Petition of Verizon*”).

⁴ *See id.* Ex. B.

⁵ *Business Data Services in an Internet Protocol Environment*, Report and Order on Remand and Memorandum Opinion and Order, 34 FCC Rcd. 5767, ¶¶ 47–51 (2019) (“*BDS Remand Order*”).

customers pay for the portions of a high-capacity BDS facility used for switched access at much lower switched access rates, rather than paying the full BDS price for the facility, regardless of the traffic riding that facility. By asking that portions of a BDS DS3 facility be reassigned as switched access channels, a customer can substantially reduce the charge for that BDS facility.

Here, Verizon asked in a number of instances for numerous switched access service channels to be provisioned on BDS DS3 facilities. But Verizon is now sending only a small volume of switched access traffic over those channels. Verizon has thus been provisioning switched access services over high-capacity BDS facilities to reduce its BDS costs, but doing so without a genuine need for the large majority of those switched access facilities. That may itself be an unjust and unreasonable practice, particularly in light of the way in which Verizon appears to be using it to avoid the effects of BDS detariffing. We do not, however, ask the Commission to rule on that here, and it is not material to the present outcome. That is because, since carriers are not required to provide mixed-use pricing, Windstream is free to simply eliminate that provision from its tariff. Windstream therefore revised its tariff to remove that pricing option.⁶

Verizon petitioned to challenge Windstream's revised tariffs on November 9, 2023. Windstream now replies to Verizon's petition and requests that the Commission deny it.⁷

⁶ See *Bellsouth v. FCC*, 469 F.3d 1052, 1057 (D.C. Cir. 2006) (noting that a carrier is not required to offer an optional pricing plan). Prior to removing this pricing provision, Windstream discussed the issue at length with Verizon, and even proposed a different tariff modification that would pro-rate BDS services that carry switched access services based on traffic volume. Verizon opposed that change, and after discussion with Commission staff about the practical difficulties of implementing a traffic study-based tariff provision, Windstream withdrew that proposal.

⁷ See 47 C.F.R. § 1.773(b)(3) (providing for the right and timing to reply to a petition to reject, suspend, or investigate a tariff filing on 15 days' notice).

DISCUSSION

As Verizon acknowledges, the Commission “may only reject a tariff” if it is “patently a nullity as a matter of substantive law,”⁸ and it may only suspend a tariff if “there are substantial questions regarding the lawfulness of proposed tariff revisions.”⁹ Here, Windstream’s tariffs provide a clear, compliant pricing mechanism for switched access services, and there is no basis to reject or suspend them. Verizon’s tariff challenge is in fact a complaint about higher prices for BDS services. But BDS services have been detariffed,¹⁰ and that is no basis to challenge Windstream’s tariffs here.

Verizon makes three arguments to the contrary, none of which is compelling. First, Verizon maintains that removing the mixed-use pricing mechanism unlawfully violates the rate cap for switched access services.¹¹ But Verizon’s argument is question-begging, in that it assumes the wrong it complains about. Verizon imagines that customers will continue to order switched access services on BDS facilities but now will pay for them at BDS rates. But the revised tariff does not permit that. To the contrary, the tariff requires customers to order and pay for switched access facilities simply on switched access facilities, and exclusive of BDS facilities. What Verizon is actually complaining about is higher *BDS* charges—but those have been detariffed, which Verizon sought—so Verizon cannot complain about that here.¹² The

⁸ *Petition of Verizon* at 6 (quoting *GS Texas Ventures, LLC Tariff* F.C.C. No. 1, Order, 29 FCC Rcd. 10,541, ¶ 4 (Wireline Comp. Bur. 2014)).

⁹ *Core Communications, Inc., et al. Tariff* F.C.C. No. 3, Order, 36 FCC Rcd. 8198, ¶ 6 n.21 (2021).

¹⁰ *BDS Remand Order* ¶¶ 47–51.

¹¹ *Petition of Verizon* at 6–7.

¹² Prior to detariffing of BDS services, local exchange carriers billed for mixed-use transport services at “a mix of the rates from the special access and transport tariffs for facilities.” *Transport Rate Structure & Pricing*, First Memorandum Opinion and Order on

charges for *switched access* services and facilities under the revised tariff comply with the price cap.

Verizon effectively acknowledges this in making its second argument, which is that the tariff is nevertheless ambiguous because it doesn't say enough about how Windstream will transition existing mixed-use facilities to segregated facilities. But Verizon points to no authority that requires a tariff to include a transition plan, and for good reason. A tariff must state the basis for charges "clearly and definitely,"¹³ which Windstream's tariff does. Once the tariff takes effect, it provides the sole basis on which customers may take service, and redundant language restating that principle for customers who had relied on a prior tariff would only confuse. Nor is there any need for grandfathering here (which Verizon does not say anything about anyway) since facilities under this tariff are ordered on a month-to-month basis. The transition to the new tariff will simply happen when a customer places its next month's order. That is all unambiguous.

Verizon's related argument, that Windstream is unclear about "whether customers may purchase [mixed-use] arrangements in the future,"¹⁴ only makes this more obvious. The answer self-evidently is no—the filed tariff doctrine requires that Windstream *only* charge for tariffed

Reconsideration, 8 FCC Rcd. 5370, ¶ 57 (1993). But now that LECs may no longer tariff BDS services, that pricing mechanism does not apply. Moreover, Verizon here has sought to use the legacy tariff language that permitted mixed-use provisioning to avoid the effects of detariffing. That is itself problematic, and a further basis for Windstream's removal of its mixed-use pricing in its tariff.

¹³ *American Message Centers*, Memorandum Opinion and Order, 8 FCC Rcd. 5522, ¶ 10 (1993) (quoting 47 C.F.R. § 61.54(j)).

¹⁴ *Petition of Verizon* at 8.

services at the rates provided for in the tariff.¹⁵ Windstream has removed mixed-use pricing, and the tariff makes that clear.

Verizon's final argument largely acknowledges that its first two arguments are inapposite, in that Verizon recognizes that (1) switched access will be charged for simply as switched access, and (2) customers will need to order separate switched access and BDS facilities. Verizon argues then that Windstream is *required* to offer mixed-use pricing and that causing customers to segregate facilities is unjust and unreasonable.¹⁶ In support of that assertion, however, Verizon relies only on the recent *Northern Valley Communications* order on traffic pumping. Verizon says Windstream's tariff change will "force customers to make '[in]efficient call routing decisions' by requiring them to segregate their switched access DS1 circuits and special access DS1 circuits onto separate DS3 circuits" and argues that makes the tariff unjust and unreasonable.¹⁷

That is baseless. First, what the Commission was condemning in *Northern Valley* was Northern Valley's unilateral change to the *physical location* to which IXC's must deliver calls.¹⁸ And in *Northern Valley*, the Commission was condemning that locational change because Northern Valley was making it to "exploit[] inefficiently high access charges" for the improper purpose of "access stimulation."¹⁹ Windstream's tariff makes no change to the locational routing

¹⁵ See, e.g., Protest of Bulloch Int'l, Inc., GSBCA No. 10168-P, 90-1 BCA P (CCH) ¶ 22,296 (Sept. 22, 1989) ("As a general proposition (basically known as the 'filed tariff doctrine'), common carriers must provide their services at prices set out in their published tariffs which are governed or controlled by some governmental authority.").

¹⁶ *Petition of Verizon* at 8–9.

¹⁷ *Petition of Verizon* at 8 (quoting *Northern Valley Order* ¶ 1).

¹⁸ *Northern Valley Order* ¶¶ 23–24.

¹⁹ *Id.* ¶ 1.

of calls, nor does it change mileage calculations. And if any party is engaged in pricing arbitrage here, it is Verizon. Most importantly, *Northern Valley* simply doesn't speak to what pricing mechanisms carriers may use or whether carriers must offer mixed-use pricing. Verizon has thus shown nothing to suggest that Windstream's tariff is unlawful.

CONCLUSION

Verizon's petition to reject, suspend, and investigate Windstream's tariffs is baseless, and the Commission should deny it. If the Commission determines in the alternative that further investigation is proper here, the Commission should permit the revised tariffs to be deemed lawful pending that investigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Alex Tate, do hereby certify that on this 16th day of November, 2023, I have caused the foregoing Reply to Petition of Verizon to Reject or Suspend and Investigate Windstream's Tariffs to be served on the following parties:

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